recruited me with an offer of promotional transfer from Goddard Space Flight Center (GSFC). Both the Robot Systems Division and NBS were later renamed the Intelligent Systems Division (ISD) and the National Institute of Standards and Technology (NIST) respectively. Albus was the Chief of the Division and remained in that position until late 1998 when he was forced to vacate it due to OIG investigation which found him to have engaged in some official misconduct for which Albus paid a substantial fine. Albus was initially hired by Evans to join NBS in 1973 and the two became "old friends and long time collaborators." Evans left NBS to join private industry in late 1970's. Faced with recurring business failures and about to lose his job, Evans persevered to return to NIST. His first attempt in 1996 for a posted vacancy was rejected. Pressured to step down, Albus used the occasion and came up with a scheme to force the return of Evans to NIST -- Albus refused to resign unless Evans were rehired to replace him as the Division Chief of the Intelligent Systems Division (ISD). For that sole purpose, in early 1998, Albus created a new ZP-V Senior Scientist position and, without posting it, rehired Evans. On December 20, 1998 Evans was installed as the new ISD Division Chief and replaced Albus without competition – Albus had managed to prevent the posting of his position as the Division Chief.

For more than ten years Albus deliberately violated my rights under the antidiscrimination and anti-retaliation provisions of Title VII by creating, supporting, maintaining and perpetuating a hostile work environment, continuing violations owing to his own acts and his support of an ongoing pattern of discrimination, retaliation, unlawful termination from work and discriminatory and retaliatory violations of my rights based on age, national origin and religion. To insure that such perpetuation would never cease, Albus deliberately installed Evans, who did not know me or anything about me except through Albus, as my <u>new</u> direct supervisor. During a short time in that capacity, in just a few

days over two months, Evans spuriously and unjustifiably singled me out and set his focus on me with one aim, which he told me without hesitation – to get rid of me no matter what. Evans was unrelenting in his hostile treatment of me which never diminished but rather grew stronger in intensity, frequency and pervasiveness. In addition to the continued hostile environment, Evans retaliated against me when I filed EEO complaints against Albus and Evans and subjected me to such harsh and adverse treatment that the treatment finally took its toll – my mental breakdown. I became incapacitated and was not able to return to work.

I filed my formal complaint with the agency after exhausting proper procedures with the EEO Counselor. I then filed my complaint with the federal judiciary system. In my complaint I complained about having been deliberately subjected to continuing violation in the form of hostile work environment, hostile retaliation and constructive discharge. I presented many instances of harassment, abuse and hostile conduct which I endured throughout the years at the hands of Albus and others and finally at the hands of Evans – all of which are components of and an integral part of continuing violation and hostile work environment. In support of my charges, I relied heavily upon the testimonies, memoranda and representations of coworkers, supervisors, experts, doctors and others and the sworn affidavits and depositions of such people – there are some 14 such affidavits as well as some 14 such depositions of such people; and also upon other information such as official EEO reports, official e-mails and other work related documents.

REASONS FOR GRANTING THE PETITION

The issues presented in this case are important because of their national significance. As this Court stated in *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct 315, 322,

> "The right to petition for redress of grievances is 'among the most precious of the liberties safeguarded in the bill of rights' [cites omitted]. Inseparable from the guaranteed

> rights entrenched in the First Amendment, the right to petition for redress of grievance occupies a 'preferred place' in our system of representative government and enjoys a 'sanctity and a sanction not permitting dubious intrusions.'"

The Maryland Trial Court's blatantly arbitrary, subjective and standardless process which has strayed from established federal constitutional and statutory law and Mandates of this Court poses a clear danger to that right and should be corrected to ensure that our Nation continues to be governed by the rule of law. Time and again this Court has pronounced that "It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds."

This Court's review of the process and decisions in the lower courts is warranted because it "decides an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the federal statutory and constitutional restraints on the ability of the judiciary system to impose *ad hoc* and unlawful exercise of judicial power to unjustifiably extinguish and destroy otherwise meritorious claims without any hearing at all. The decision below also conflicts with precedents of this Court, other courts throughout the Nation and even precedence in its own court(s). Sup. Ct. R. 10(b).

There is a profound national interest in ensuring the fairness of the judicial process. This is the sort of case that this Court should hear. The fact that this case is "pro se" should not be a bar to review; actually, because of it, review is warranted. If it does, the Court would send a strong national signal that, when it comes to petitioning the Government for grievances, no voice no matter how weak is left behind. The review would significantly strengthen, if not restore, the trust and faith of the people in their Government and encourage their own participation– a Government of the

people, by the people and for the people; if it does not, it would send the opposite signal that the First Amendment is hollow and toothless because it only serves a select few. It would raise some citizens' voices above others in contravention of the First Amendment Rights.

I initially brought my action with the conviction that justice would prevail. I am still convinced that it will. Thus far, however, I have encountered unjustifiable road blocks to achieve justice. Some of those roadblocks are noted by Justice Goldberg in *Thornbrough v. Columbus And Greenville R. Co.* U.S. Court of Appeals, 5th Circuit, No. 84-4410, 760 F.2d 633 (1985). Quoting from Robert Browning, Justice Goldberg wrote: "Grow old along with me! The best is yet to be, The last of life, for which the first was made." *Id.* at 637. Justice Goldberg continued, "For many elder Americans, Browning's verse is a cruel jest rather than a reassuring vision. Not only must they face the inexorable advance of nature—they must face the biases of their fellow men." *Id.* Furthermore, "In 1967, recognizing that one of the tests of a civilized society is its treatment of the elderly, Congress enacted the Age Discrimination Act .... The Act has as its purpose the 'elimination of discrimination from the workplace,' ... by making it unlawful for employers to discriminate against persons between the ages of forty and seventy based on their age." *Id.* My disadvantage, however, was not just limited to age; it was compounded by the fact that I am a more observant person of the Jewish faith, I come from a country in the Middle East—Iran, which has been a formidable source of long-term agony for the United States (both for which I was ridiculed and treated disparately) and that my formal first name is "Azizollah," which caused me to be mocked by supervisors and other staff because it is both Arabic and sounds similar to "Ayatollah." My disadvantage was further compounded by the fact that I ran out of resources and was forced to appeal my case as Pro Se and further, in the same capacity, for Rehearing and Rehearing En Banc and in the same capacity for this petition.

I. Review Is Warranted In This Case Because The Court Below Disregarded Federal Laws Governing The Right To Petition The Government For A Redress Of Grievances, The Right To Due Process, The Right To Equal Protection And The Right To Protected Property Interest.

The district court Judge (henceforth "the Judge") violated my federal rights under the First Amendment, Due Process and Equal Protection laws and deprived me of Protected Property Interest when the Judge abused his discretion and allowed the extinguishing of my cause of action.

As I stated above, charge of retaliation was one of my causes of action against the Defendant -- it is a bona fide charge under Title VII. Recognizing this charge, in his first memorandum, the district court Judge limited his consideration of my charge by simply mentioning the word "retaliation" in two distinct references, "by retaliating against him" (see App. A at 1) and "to retaliate against him for complaining to the Equal Employment Opportunity Commission ('EEOC')" (see App. A at 3). The Judge did not consider my charge and quashed it by keeping silent and refusing to render any opinion. Unlawfully, the judge violated my right under the Constitution requiring a fair hearing of my grievances and their redress. The Judge acted in this manner despite his full knowledge that, with regard to my retaliation charge, the Defendant's (U.S. Department of Commerce's) own internal investigation had established that,

> "Complainant filed his first EEO complaint on February 24, 1999. On March 10, 1999, Evans, who was interviewed by the EEO Counselor for the first complaint, issued a memorandum critical of Complainant's performance. On May 20, 1999, he issued a letter concerning Complainant's continued use of leave. These actions followed Complainant's first complaint within such a short time that we find a prima facie case of reprisal." Underlining added. (See App. E at 12).

With this crucial evidence before it, the Judge could have firmly established that, taken as a whole, there exists ample evidentiary record before a jury to support a conclusion of retaliatory conduct and retaliation both of which Albus and Evans exercised against me. But, the Judge remained silent and refused to render any opinion. So did the panels at the Appeals Court.

The Constitution has established the right of redress for grievances under the First Amendment. The Right to petition in courts is a fundamental Right also guaranteed by the First Amendment. See *California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). In *Chambers v. Baltimore & Ohio R.R.* , 207 U.S. 142, 148 (1907), the Supreme Court of the United States recognized the central role of the Petition Clause as follows,

> "The Right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights and lies at the foundation of orderly government."

Owing to the fact that government controls all judicial processes, a lawsuit can be said to be a "Petition to Government to Redress Grievances" whether the grievance is against private persons or government. Recognizing this fact, the Court pronounced that access to courts and petitioning through the courts are both First Amendment Rights. The Court has declared,

> "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is but one aspect of the right of petition." *California Transport v. Trucking Unlimited*, supra, at 510.

But, in a much stronger sense, the Petition Clause is the focal point of the First Amendment when a petition to courts is a petition to redress grievances with the courts themselves. See *City of Long Beach v. Bozek*, 31 C.3d 527. It is to expand the effectiveness of judicial remedies for violations of fundamental rights, notwithstanding that the violation may be committed by persons acting in an official capacity. This

means that the Right to petition government for redress implies the Right to effective, compulsory means to obtain redress for wrongs by government. Thus, the Petition Right is the most important of all rights because, without it, government cannot be held to account for its wrongs; but with it, every person has the effective right to compel government to obey the law with respect to the person's Rights, and to command just compensation for injuries which the person has suffered. See *Chambers* supra. Furthermore, the Court has held,

> "The right to petition for redress of grievances is 'among the most precious of the liberties safeguarded in the bill of rights' [cites omitted]. Inseparable from the guaranteed rights entrenched in the First Amendment, the right to petition for redress of grievance occupies a 'preferred place' in our system of representative government and enjoys a 'sanctity and a sanction not permitting dubious intrusions.'" *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 322. Indeed, "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guarantee with the rights of people peaceably to assemble and to petition for redress of grievances." *Id.* at 323.

It seems to reason that, if the filing is protected, then surely the object of the protected Right – of obtaining a due process guaranteed fair hearing of petitioner's grievances and their redress – is the very essence of the Petition Clause. This truism is applicable to all petitioners including myself.

In fact, the characteristic which distinguishes petitioning through the courts from other forms of petition is the access to compulsory process of law, wherein the parties are equal before the law. Without ultimate recourse to that compulsory process, there is no reason for government to listen to grievances at all, let alone to redress them fairly.

It is therefore axiomatic that, underlying all civil relations between the Government and the Governed is the fundamental Right of the Governed to compel Government's obedience to law, through the compulsory process of the law.

If that is not so, Government will say that peoples' only Rights to redress are really gifts of Government. No "gift" can be an acceptable substitution for the "fundamental Rights" of the people. The arbitrary and standardless action of the Judge violates my First Amendment Rights. His unlawful action raises some citizens' voices above others, and drowns out still others. The First Amendment can not withstand such judicial overreaching.

The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances – "... abstract words of the Due Process Clause ... [which] at a minimum ... require that the deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." See *Mullane v. Hanover Bank &Ttrust Co.* , 339 U.S. 306, 313 (1950). Furthermore, to make it crystal clear that a cause of action and the opportunity for its fair hearing and redress is a fundamental right protected by the Constitution, the Court determined and held that a cause of action is a species of property protected by the Due Process Clause. *Id.* That is to say that in the eye of the Constitution a "cause of action" is the "property interest" of the litigant and enjoys the same constitutional protection as for "property right."

In fact, to further make the point crystal clear, the Court interpreted the "property" component of the Fifth Amendment's Due Process Clause as if it is one and the same as the "cause of action" and used that determination to even impose Constitutional limits to the powers of the courts. In *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958), without a hearing, the trial court had dismissed a plaintiff's claim for failure to comply with trial court's order. The Court reversed and furthermore read the "property" component of the Due Process Clause of the Fifth Amendment to impose "constitutional limitations upon the powers of courts, even in aid of their own valid processes, to

dismiss an action without affording a party the opportunity for a hearing on the merits of his case."

The Court decisions have emphasized time and again, that the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that ... "some form of hearing" is required before the owner is fully deprived of a protected property interest. See *Board of Regents v. Roth*, 408 U.S. at 570-57, n.8.

Each of these facts leads to the conclusion that as the appellant, I am entitled to have the trial court consider, based on the substantiality of the available evidence, the merits of my charge before deciding to terminate my claim. My interest in redressing instances of retaliation are all substantial. At the same time, unless this Court intervenes, the deprivation here is final. Any system or procedure that deprives persons of their claims in a random manner or otherwise without consideration of the charge and a fair hearing necessarily presents an unjustifiably high risk that meritorious claims will be terminated. In my case, it is the trial Judge himself who unlawfully destroyed my property interest without any justification. The Judge operated to terminate my meritorious claim without a hearing at all, while allowing frivolous complaints of others to proceed through the entire judicial review process. Terminating potentially meritorious claims in an *ad hoc* and random manner is hardly a practice even in line with our common-law traditions.

Since a cause of action is a species of protected property, the district court judge has likewise deprived me of my protected property when he violated my constitutional right and destroyed my action without affording me the opportunity for a hearing on the merits of my case.

Fifty years ago under Chief Justice Warren, the Court read that the Due Process Clause of the Fifth Amendment

includes a guarantee of Equal Protection equivalent to that of the Fourteenth Amendment's Equal Protection Clause. In *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) pronounced,

> "The Fifth Amendment, ..., does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and the due process, both stemming from our American ideal of fairness, are not mutually exclusive."

In my case, the trial Judge's action unambiguously divided claims - and thus, claimants – into two discrete groups that are accorded radically disparate treatment -- claims that are given full consideration on the merits and whereby, complainants bringing such charges are awarded the opportunity for full judicial reviews, yet by contrast, otherwise identical claims that do not receive a hearing are unceremoniously, and finally, terminated.

The Court "consistently has required that legislation classify the person it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). However, the classificatory scheme must "rationally advanc[e[a reasonable and identifiable governmental objective." *Id.* at 235.

Title VII itself has several expressed purposes (please see supra section CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED). It is evident at a glance that none of these objectives is advanced by Judge's action. Terminating potentially meritorious claims in a random manner obviously cannot serve to redress instances of discrimination. Here, the Judge may unjustly operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire judicial review process.

This Court has an obligation to review the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary.

Here, that inquiry yields an affirmative result. So far as Title VII purpose is concerned, every Title VII claimant's charge stands on the same footing. Yet, certain randomly selected claims are irrevocably terminated without review. In other words, the judge converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. "[T]he Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out," *James v. Strange*, 407 U.S. 128, 140 (1972), and that rationality is absent here. Giving preference to a discrete class "merely to accomplish the elimination of hearing on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause ..." *Reed v. Reed*, 404 U.S. 71,76 (1971).

The Judge's classification failed to promote Title VII objectives in any rational way. As a claimant, I possessed no power over the Judge's decision. It is unfair and irrational to punish me for the Judge's failure. The Judge's classification, which bore no relationship to the merits of my retaliation charge, is arbitrary and irrational when measured against Title VII purposes. By his refusal to consider and afford me a fair hearing of my charge, the Judge also deprived me of the Equal Protection Clause under the law.

The Judge's unlawful action only confirms the wisdom of the constitutional design, faithful adherence to which requires that the Court review the Judge's usurpation of judicial power in defiance of the Constitutional plan. The Court should grant review and reverse the judgment below for all of these violations of the laws and deprivations of my rights guaranteed by these laws.

II. Review Is Warranted In This Case Because The Measures Used In The Court Below To Decide Whether A Work Place Is Hostile Are In Conflict With The Mandated Yardstick Set By This Court, Employed By Other Courts, Including Its Own, And The Governing Federal

Statutes. The Yardsticks Devised By The Court Below To Determine Hostile Work Environment And Constructive Discharge Claims Do Not Pass Constitutional Muster.

A. 4th Circuit proclaimed Standards for summary judgment

The traditional view of the 4th Circuit Court of Appeals regarding the principles of summary judgment has been that, "The burden is on defendant, as the moving party, to demonstrate the absence of any genuine issue of material fact. ... The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to plaintiff, as the party opposing the motion. ... Only where it is 'perfectly clear that there are no issues in the case' is summary judgment proper, and even where a directed verdict would be proper after hearing the evidence, the district court should not try the case in advance by summary judgment. ... The non-moving party is in a favorable posture, being entitled 'to have credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered.' ... Care is required in deciding whether the evidence presents a genuine issue of motive, for 'summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense.' ... Resolution of questions of intent often depends upon 'the credibility of the witnesses, which can best be determined by the demeanor of the witnesses during direct and cross-examination.'" *Ross v. Communications Satellite Corp.* , 759 F.2d 355 (1985, 4th Cir.). In accord, *Charbonnages*, 597 F.2d at 414; *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir), cert. denied, 342 U.S. 887, 72 S.Ct. 178 (1951); *United States v. Diebold*, 369 U.S. 654,

655, 82 S.Ct. 993, 994 (1962); *Poller v. Columbia Broadcasting Systems Inc.* , 3698 U.S. 464, 473, 82 S.Ct. 486, 491 (1962); *Morisson v. Nisan Co., LTD,* 601 F.2d 139, 141 (4th Cir. 1979); *Abasiekong v. City of Shelby,* 744 F.2d 1055, 1059 (4th Cir. 1984); *Duke V. Uniroyal, Inc.*, 928 F.2d 1413, 1419 (4th Cir.), cert. denied, 502 U S. 963 (1991); *Taylor v. Home Ins. Co.*, 777 F.2d 849, 854 (4th Cir. 1985); *Williams v. Staples, Inc.* No. 03-1550 (4th Cir. 2004) (Quoting *Thomson v. Aluminum Co. of Am.* 276 F.3d 651, 656 (4th Cir. 2002) - In reviewing the evidence, the court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determination or weigh the evidence.)

Fully cognizant of these principles set by his own 4th Circuit Court, the Judge's unlawful actions show his defiance to them – he violated most if not all, of these principles (see App. A and B). He also violated following Mandates of the Court uniformly adhered to by all other courts including his own 4th Circuit Court in other cases similar to mine.

B. Hostile Work environment – Standards of Review

The long-standing standard of review for the determining of harassing and hostile work environment is established in *Harris v. Forklift Systems, Inc.* 126, LED 2nd 295, 510 U.S. 17 (1993), the standard which is also followed by the 4th Circuit. *Harris*' test, among other things, prohibits time-barring as well as the desegregation of abusive and harassing conduct. To determine whether an environment is hostile or abusive, *Harris* expressly enacted the "totality of circumstances" standard,

> "But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance." *Id.* at 302, underlining added.

Quoting *Harris*, the Court expressly directed other courts to only employ the "totality of circumstances" yardstick in determining hostile work environment,

> "We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. Boca Raton* 524 U.S. 775, 787, underlining added. In accord *Oncale v. Sundowner Offshore Services, Inc.* 118 S. Ct. 998 (1998).

In *National R.R. Passenger Corp. v. Morgan* 536 U.S. 101 (2001) the Court distinguished hostile environment from discrete acts as follows,

> "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. ... ('The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence')." *Id.* at 115.

The Court clearly expressed that disaggregating the work environment into a series of discrete incidents is in violation of the statute,

> "A hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 117.
>
> "The statute does not separate individual acts that are part of the hostile environment claim from the whole ... ." *Id.* at 118.

As in *Harris*, *Morgan* prohibits time-barring of the abusive and harassing conducts.

> "The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years ..." *Id.* at 115.

The Court then held that,

> "Given therefore that the incidents comprising a hostile w rk environment are part of one unlawful employment

> practice, the employer may be liable for all acts that are part of this single claim." *Morgan*, supra, at 118.

Except in my case, the Fourth Circuit has consistently applied *Harris*' "totality of circumstances" test to determine whether a work environment is hostile. See for example *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001); *Ocheltree v. Scollon Prods., Inc.* 335 F.3d 325, 331 (4th Cir. 2003); Cf. *Conner v. Schrader-Bridgeport International, Inc.*, No. 98-2055 at 10 (4th Cir. 2000).

Other courts have recognized the above statutory mandates that, in evaluating a hostile work environment claim, the fact finder must consider "all the circumstances." For example, *Henson v. City of Dumdee*, 682 F.2d 897, 904 (11th Cir. 1982)

> ([T]he district court should not carve the work environment into a series of discrete incidents and then measure the harm adhering in each episode. Instead, the trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate and that the work environment created thereby may exceed the sum of the individual episodes");

Smith v. Kmart, 1996 WL 780490 at *8 (using "totality of circumstances" standard in age harassment case); In accord are *EEOC v. Mitsubishi Motor Manufacturing*, 990 F. Supp. 1059, 1074 (C.D Ill. 1998); *Jenson v. Eveleth Taconite Company*, 130 F.3d 1287 (8th Cir. 1997); *Robinson v. Jacksonville Shipyards, Inc.* 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); *Burns v. McGregor*, 955 F.2d 559, 565 (8th Cir., 1992); *Vance v. Southern Bell Telephone and Telegraph Company*, 863 F.2d 1503, 1510-1511 (11th Cir., 1989); *Durham Life Insurance v. Evans*, 166 F.3d 139, 149 (3rd Cir., 1999) (employers cannot "disaggregate the various allegedly discriminatory acts and endeavor to cast doubt on each one; lower court had appropriately refused to consider each discriminatory incident in a vacuum.")

Several courts have recognized that under *Harris*' "severe-or-pervasive" test, a single incident of invidious harassment can create a hostile work environment. See for example *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 n.4 (7th Cir., 1991) (indicating a single instance of racial harassment can establish a hostile work environment); *Torres v. Pisano*, 116 F.3d 625, 631, n.4 (2nd Cir., 1997) (single incident of sexual harassment can in some circumstances suffice to state a claim of hostile work environment of sexual harassment).

Courts have also ruled that "time gaps" between specific incidents of harassment do not defeat hostile work environment claim. See for example *Waltman v. International paper Co.*, 785 F.2d 468, 476 (5th Cir. 1989) (hostile work environment claim not defeated by time gaps between the specific incidents of harassment, noting cases in which harassment involved separate incidents spanning many years); *Ways v. City of Lincoln*, 871 F.2d 750, 755 (8th Cir., 1989) (evidence of an average of 3 incidents per year over 17-year employment sufficient for hostile work environment claim.)

These latter holdings by themselves defeat the Judge's reasoning for destroying my hostile environment cause of action. In his first memorandum (App. A, at 9), the Judge falsely argued that "Abrishamian's allegations of offensive conduct do not establish a hostile work environment" because, according to the Judge, "Abrishamian admits that there were long periods when he was not subject to offensive remarks." I do not know where the Judge obtained this information; After hostile environment began there were no long periods when I was not subject to harassment including offensive remarks. Regardless, gaps would not defeat my hostile work environment claim.

As to the relationship between "hostile work environment" and "constructive discharge," the Court has declared that the "[c]reation of a hostile work environment is

a necessary predicate to a hostile-environment constructive discharge case." Cf. *State Police v. Suders*, No. 03- 95, slip op. at 11 (U.S. 2004).

It stands to reason that, when faced with the claims of hostile work environment and constructive discharge by the same claimant, the trier of fact should look into the hostile environment claim first. The court in *Landgraf* did but not the Judge who actually cited *Landgraf* (see App. A at 9) which expressed, "[t]o prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove hostile working environment." *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992) quoting *Pitman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981).

Notwithstanding the above clear Court declarations, to destroy my cause of action for hostile work environment claim, the Judge imposed his own rule which he created by fiat and unlawfully departed from the established legal requirements set by the Court. In the guise of first analyzing "constructive discharge claim," the judge used his newly fashioned invention and reduced the conducts of my hostile environment claim to "five remarks" (App. A, page 9, last line). Only then did the Judge commence his analysis of my hostile work environment claim, without citing *Harris*, and failing to consider the "totality of circumstances" afresh for the hostile work environment analysis, the Judge unlawfully used these same selectively remnant "five remarks" as the sole components of my hostile work-place claim and disposed of my hostile work environment cause of action.

The Judge's action in first analyzing "constructive discharge" claim was not by accident but by design. The Judge knew well that, were he to consider my hostile environment claim first, in the face of all of the above-mentioned Court mandates and lawful statutes regarding the determining of a hostile work environment and the Court's

imposition of "looking at all circumstances," he could not get away with destroying even one hostile conduct, let alone with the major destruction he committed. In committing such destruction of my hostile work-place evidence, the judge acted in flagrant violation of the Court's imposed requirements for determining hostile environment claims. He unlawfully and selectively carved out a small portion of the total hostile conduct; disaggregated this portion into individual incidents; weighed each incident in isolation and flushed away most of them by various methods, some of which are described below.

a. Flushing away evidence by way of time-barring

In measuring the individual hostile acts in the context of his "constructive discharge" analysis, the Judge weighed some of the hostile conducts in isolation and excluded them by way of time-barring. The judge reasoned, "Many of the incidents Abrishamian points to happened so far in the past that no reasonable jury could find that they affected his work environment as of the time he resigned." Moreover, "[a]ccordingly, conduct that occurred in early 1990's says little about his working environment in 1999." (App. A at 6). Examples of hostile conduct the court eliminated in this way are 1) "rhymed his name 'Azizollah' with "Ayatollah"' 2) "ridiculed him for observing kosher" 3) segregation 4) "pocket-vetoed his promotion" 5) he was "forced to move to a basement office" (I was the only Division employee Albus or Evans ever placed in any basement room) 6) by force, "shared another office with his former secretary" (I was the only Division employee Albus or Evans ever so treated) and 7) was "wrongfully passed over for several promotions." (App. A at 6 and n3.) The Judge reasoned that conducts 1 and 2 occurred sometime around 1991. In actuality, they both started around 1985-1986 and remained in force until I left the ISD. For exclusion of conduct 3, the Judge figured that the Group was formed sometime in 1988 and that its members have long since moved on to other assignments. In

fact, formed in 1988, the Performance Measures Group lasted well into 1995, if not longer, where I was forced to work under humiliating conditions for seven years. For the exclusion of the remaining conduct the Judge figured that they occurred prior to the mid-1990's. Actually, the sharing of an office with my former secretary and Albus' rejecting my last promotion did not occur until 1998.

Following his design, the Judge erroneously analyzed Albus' refusals to promote as "discrete acts" (App. A at 4). In each case, Albus' refusal to promote me was not because I was not qualified, as I was qualified; it was because he was engaged in harassing conduct (in each such case Albus invariably harassed me by comparing me with "Ayatollahs" and branding me as a follower and not a leader because Albus claimed, "Iranians are followers and not leaders because they are lead by Ayatollahs," etc.) which culminated in a tangible employment action against me, i.e. failure to promote. The Supreme Court in *Suders*, supra at 9, identifies two categories of hostile work environment claims: 1) harassment that culminates in a tangible employment action and 2) harassment that takes place in the absence of a tangible employment action. The Court identifies "failure to promote" as a tangible employment action. Therefore, each and every act of harassment by Albus that culminated in a refusal to promote was part and parcel of the ongoing total hostile work environment.

b. Flushing away evidence by way of weighing against constructive discharge threshold.

The Judge isolated from the whole and trivialized Albus' deliberate repeated performance downgrading and Evans' false performance evaluation with the term "unfair performance reviews," and flushed them away after he unlawfully weighed them against a constructive discharge threshold (App. A at 7), a litmus test much higher than those for hostile environment claims; see *Landgraf*, supra at 1077. The Judge violated the law when he did not assess the

evidence in its totality as required by *Harris*. Additionally, in *Von Gunten v. Maryland*, 243 F.3d 858, 867 (4th Cir. 2001) the 4th Circuit held that a "downgrade of performance evaluation *could* effect a term, condition, or benefit of employment" if it has a tangible effect on the terms or conditions of employment." Each downgrading of my performance evaluation had severe tangible impact on my employment and therefore each effected a term, condition, or benefit of my employment. Likewise, Evans' false evaluation effected a term, condition, or benefit of my employment because it involved falsehood and other tangible effects. Furthermore, the Judge's contention, "Abrishamian's subjective view that his performance warranted a positive evaluation is entitled to no weight," is baseless because the facts have nothing to do with my view, subjective or otherwise. The record in each case of downgrading and the adverse evaluation shows that in fact it was in the views of my supervisors, Lee and Albus himself, that my performance warranted much higher positive evaluation.

The Judge also disregarded the fact that the production of Evans' false evaluation was indeed retaliatory. I have discussed this issue at length above (pages 7-13 supra). The point is that in spite of the fact that the wrongdoer itself admitted to the finding of *prima facie* case of reprisal (App. E), the Judge, on the other hand, sided with the wrongdoer and defended the wrongdoer's adverse action by terming it "given unfair performance reviews." (App. A at 7).

Likewise, the Judge isolated from the whole Albus' and Evans' refusal to timely give me my FY-98 performance plan, trivialized it with the term "not given sufficient guidance" (App. A at 7) and flushed it away after weighing it against a constructive discharge threshold. The issue here is not whether Albus' and Evans' actions rose to the level of constructive discharge, but rather the fact that both Albus and Evans singled me out, treated me differently from all the other ISD employees and, thereby, discriminated against me.

The Judge disregarded the fact that, for the first time in my entire tenure with NIST, both Evans and Albus failed to provide me with my performance plan which I should have received some 4 ½ months prior to when I finally received it in February, 1999. Likewise, neither Evans (nor anybody else for FY-99) ever assigned me any engineering tasks let alone tasks commensurate with senior level engineering work – but that prior to giving me my plan Evans assigned me secretarial and technician level tasks to supposedly keep me busy. As part of the ongoing hostile work place, Evans adversely evaluated my job performance on these activities which I had already performed prior to receiving my plan or on other activities which were already rated in previous years by Albus and Herman as "satisfactory" but which Evans re-rated as "unsatisfactory." Instead of looking at this issue in an impartial manner and following the above 4th Circuit proclaimed standards for summary judgment (page 14, supra), the Judge again defended the wrongdoer. This time, he cited case law – *Weirauch v. Department of Army*, 782 F.2d 1560 (Fed Cir. 1986) and claimed, "While the complete failure to give an employee any performance review or plan may constitute a violation of CSRA, mere delay does not." (App. A at 11). The Judge misunderstood the significance of the *Weirauch* case he himself cited and never cared to learn about the scope of my hostile work-place complaint. My complaint had nothing to do with any "delay." I was merely explaining that Evans evaluated my job performance on non-engineering activities which I completed prior to receiving any valid plan, valid standards or valid critical elements. On the other hand, a cursory review of the *Weirauch*'s case makes it clear that "With respect to *Weirauch*, his performance was appraised on the basis of the criteria communicated to him no later than May, 1982. Only incidents thereafter and before February 1, 1983, were considered in support of the unsatisfactory performance ratings given to him on which his removal is based." *Id.* at 1563; underlining added. In fact, by his own citation, the

Judge proved my case of discrimination, harassment and hostile work environment but he would never admit to it.

Likewise the Judge isolated and trivialized Evans' demand for me to produce under duress a vast amount of medical information as "sought sensitive medical information from" me or "Evans requested that Abrishamian provide him with medical information" (App. A at 3, 8). The fact is that Evans did not simply "request" or simply "seek," but actually "demanded," for his own personal use, and placed me under additional duress. After Evans' adverse actions caused my mental breakdown and I became incapacitated to do good work I went on sick leave. Evans approved two 2-week periods of sick leave followed by one 4-week period. At the time when I made my requests, Evans never told me that he needed any special set of medical documentation from my doctor. But, during the last 4-week period, fully cognizant of the fact that he had had four (4) weeks time to obtain any necessary medical document, he deliberately waited until 2 ½ days before the expiration of this 4-week period and served me with a terse demand by a personal server. In his letter, Evans demanded the production of a vast amount of medical documentation to be prepared and delivered to him before the end of the 4-week period. He made his demand fully cognizant of the facts that doctors are not waiting like waiters to serve their patients and that it would take an appreciable amount of time for my doctor to prepare and provide documents demanded by Evans. While the wrongdoer itself admitted to the finding of *prima facie* case of reprisal (App. E), the Judge again sided with the wrongdoer, defended the wrongdoer's adverse action and, as if speaking for the wrongdoer, said, "Evans requested that Abrishamian provide him with medical information so that Evans could approve Abrishamian's sick leave." (See App. A, at 8). If it were just a true and bona fide request, Evans could have done it immediately or shortly after his approving the 4-week leave, but he did not; moreover, he did not need to serve me with a personal server, which he did – it was not

a request but personal adverse demand in order to harass me even when he had full knowledge that I was sick at home.

Moreover, the Judge's declaration, "Similarly, Abrishamian's decision to continue working until 1999 means that he himself did not find his situation intolerable in earlier periods" (App. A at 6-7) is painful and insensitive. It flies in the face of his own 4th Circuit Court of Appeals declaration in Cf. *White v. BFI Waste Services*, No. 03-1833; 03-2020 (4th Cir. 2004). There, the Appeals Court regarding Gaskins who was still employed by BFI, held, "Gaskins' continued employment with BFI does not defeat his hostile work environment claim. One need not sacrifice one's job (and a steady source of income) in order to prove that the racial harassment in the workplace rose to the level of actionable hostile work environment." *Id.* at 14.

c. Flushing away evidence by way of the Judge acting as engineering expert.

The Judge erred when he wrongly figured that "the record contradicts any claim that [Abrishamian] was doing solely menial work," that the "record establishes that, in 1998 or early 1999, Abrishamian was given six complex engineering tasks." (App. A at 7). There is no record in existence to support any of these contentions by the Judge. On the contrary, testimonies from engineers, scientists and doctors of philosophy in the field of engineering such as Amatucci (he was the ISD Division Deputy Chief for several years), Wheatly, Juberts, Wakid, and Swyt show that I was indeed assigned only menial, technician and secretarial-level tasks. Even the wrongdoers, Evans and Albus themselves admitted to this. Moreover, the Judge erred by making determinations in areas where he lacks expertise. He is not an engineer, much less one in this field. Assessment of scientific and engineering work, whether it has to do with "the relative complexity of high-level engineering tasks" or otherwise, is best left to the experts in these fields; the Judge himself later

commented "court is in no position to judge the relative complexity of high-level engineering tasks" (App. A at 7).

Likewise, in dismissing the hostile conduct when Albus compelled me to do janitorial work for others, the Judge said, "Department expected all engineers to keep their labs clean and well organized" (App. A at 7). I did not take issue with the fact that employees were expected to clean up after themselves. Instead, I am contending that I was not treated comparably because of my age, pigmentation, religion and national origin. I was discriminated against because Albus repeatedly singled me out and had me act as a janitor and keep labs clean after they had been made dirty and cluttered by other coworkers, visitors or guest workers. I was the only Division engineer, senior or otherwise, Albus singled out in this manner.

d. Flushing away evidence by way of the Judge being insensitive to prejudice.

The Judge was insensitive to racial and ethnic slurs, to which I was continually subjected; he termed them as merely "offensive comments," "rudeness" and "coworkers rudeness" (App. A at 2, 4(n1)). Racial epithets such as being an Ayatollah; being a follower of Ayatollahs; being only capable of following, like dumb sheep, being led by Ayatollahs; being an Arab-kind of a person; mockingly rhyming my formal name "Azizollah" with "Ayatollah," including in song; as well as comparing me with Ayatollahs had been going on for many years up until 1999 when I left work. Such conduct is plainly despicable, highly repugnant, hostile and humiliating according to any reasonable person's standard, particularly myself because the perpetrators well knew that I am Jewish. My whole family suffered tremendously, including the murder of my father, under the oppressive, terroristic, despotic and anti-Semitic regimes and beliefs of the Ayatollahs and their followers and adherents in Iran. Ayatollahs are considered to be brutal terrorists and rulers of terror, internationally and otherwise, over peoples,

communities, emirates and countries. They are considered to be instigators of terror, despots and brutal Anti-semitic oppressors of those who do not follow or agree with their ideology. They are considered to be instigators of throat cutters who behead the innocent as "infidels." To repeatedly and frequently compare me with Ayatollahs and equate me with their followers is painful and nothing short of character assassination – falsely identifying me with mass-murdering felons by calling me a terrorist, ruler of terror, someone who ascribes to the use of terror and terroristic acts whether such acts are committed locally, internationally or otherwise. To trivialize these ongoing racial and ethnic slurs as simply "offensive" or "rude" flies in the face of decency and manifests injustice.

The Judge also was insensitive to Evans' racial and ethnic slur that as an Iranian and a Jew I knew how to cajole my doctor into preparing his report according to Evans' specific timing and other demands (App. A at 8). Evans' slur sets Iranians and Jews as being dishonest and unscrupulous. In my case, however, it is particularly injurious because I am both an Iranian and a Jew. Prejudice of this sort is indicative of blatant disdain for the recipient, one who is seen as unentitled to respect and equal rights, seen as subhuman as a Jew, and such was the practice. To be insensitive to this type of repugnant racial and ethnic slurs and attempt to explain them away, that they just occurred "sometime around 1991" (App. A at 6) - they had not, they continued for many years and until I left in 1999, in fact, Evan's above slur took place while I was sick at home (I never was able to return to work) - is the same as condoning them. It also flies in the face of the 7th Circuit declaration in *Daniels*, supra at1274 n.4 (7th Cir., 1991) (indicating a single instance of racial harassment can establish a hostile work environment).

e. Decision in conflict with similar 4th Circuit precedence

The frequency and regularity of the unwelcome conduct established by the evidence in my case is similar to that underlying the 4th Circuit's decision in *Amirmokri v. Baltimore Gas and Electric Co.*, 60 F.3d 1126 (4th cir. 1995) and *Conner v. Schrader-Bridgeport International, Inc.*, 227 F.3d 179 (4th Cir. 2000). In *Amirmokri* a supervisor and coworkers abused an Iranian plaintiff by calling him "the local terrorist," a "camel jockey," "the Ayatollah," and "the Emir of Waldorf." Setting the standard for a national origin harassment claim, the *Amirmokri* Court, after considering *Amirmokri*'s work atmosphere in totality, held, "A reasonable person could easily find this atmosphere to be hostile." *Amirmokri*, supra at 1131. In *Conner*, the 4th Circuit Court, by its consideration of four hostile events, reasoned and concluded that the unwelcome conduct established by the record was sufficiently humiliating to support the jury verdict.

In addition to being erroneous, the Judge's decision also fails to comport with its own 4th Circuit Court holdings in *Amirmokri*, *Conner* and other cases cited above. The Judge's decision also fails to comport with holdings in other Circuits as discussed above. These conflicts further support the reversal of the Judge's ruling and review in this Court. Sup. Ct. R. 10(b).

C. Constructive discharge Standard of Review; conflict with similar 4th Circuit precedence

As in the hostile case, the trial court discarded and failed to consider the most important relevant conduct, that the constant stress created by the hostile work environment caused my mental breakdown. Indeed, after establishing hostile work environment claim, this was the most probative relevant evidence with respect to my claim of constructive discharge. This conduct is similar to that underlying the 4th Circuit court's decision in *Amirmokri*, supra. In *Amirmokri*, the plaintiff became afflicted with an ulcer caused by the constant stress due to his hostile work environment.

Considering the plaintiff's work atmosphere, the *Amirmokri*'s court reasoned, "The constant stress created by this atmosphere caused him to get an ulcer and eventually resign. A reasonable trier of fact could find these conditions intolerable." *Amirmokri*, supra, at 1132. In my own case, I became afflicted with a mental breakdown due to the ongoing hostile work environment I endured for many years. The Government declared me disabled based upon the opinion of Dr. Rojcewicz who wrote,

> "[T]o a reasonable degree of medical certainty, that the current medical conditions that I have described were caused by or related to the stress of Mr. Abrishamian's work environment."

Further, he wrote,

> "Mr. Abrishamian's inability to perform useful and efficient service arose while he was serving under the Federal Employees' Retirement System. He had been working as a ZP-0855-IV Electronics Engineer at the Intelligent Systems Division, National Institute of Standards and Technology, U.S. Department of Commerce."

Moreover,

> "I advised him that he could not go back to work because of his psychiatric condition."

Mental breakdown may be a more severe affliction than an ulcer because the latter may be treatable but not necessarily the former. It is very painful when the Judge himself gets into character assassination by stating, "The fact that a worker may feel stymied in his professional advancement does not give him license claiming constructive discharge." (App. A at 8).

The Judge's unlawful action unambiguously divided claims - and thus, claimants – into two discrete groups that are accorded radically disparate treatment -- claims that are treated impartially and in accordance with the existing federal laws and statutes and the mandates of the Court, yet by contrast, otherwise identical claims are treated by judicial fiat and in flagrant violation of the same federal laws,

statutes and Mandates of the Court. The Judge's classification failed to promote Title VII objectives, Federal statues and Mandates of the Court and even the promulgated 4th Circuit standards of review for summary judgment in any rational way. Because by his refusal to follow the law the Judge also deprived me of the Equal Protection Clause under the law, review is warranted.

The arbitrary decision by the Judge to defy the well established mandates of the Court, as they plainly stood prior to the Judge's actions, is in flagrant violation of the Courts imposed requirements regarding the determining of hostile work environment and constructive discharge claims. But the plain language of the federal statute and the Court's mandates indicate that the Judge must follow them; it is also plain that the Judge failed to do so. Given the importance of the issue, the Court should decide whether or not the Court meant what it said, when it directed that, "We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' ..." *Faragher*, supra at 787. If the Court did, then the judgment below must be reversed. Also because the Judge's decision "conflicts with [a] relevant decision[] of this Court," review is warranted. Sup. Ct. R. 10 (c). Likewise, Because the Judge's decision fails to comport with his own 4th Circuit Court holding in *Amirmokri* and with holding in other Circuits review is warranted. Sup. Ct. R. 10(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Azizollah Abrishamian
9328 Edgewood Court
Gaithersburg, Maryland 20877
(301) 977-2460

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AZIZOLLAH ABRISHAMIAN,	:	
Plaintiff,	:	
	:	
v.	:	
	:	**CIVIL NO.**
DONALD L. EVANS, SECRETARY,	:	**L-00-2746**
U.S. DEPARTMENT OF COMMERCE,	:	
Defendant.	:	

MEMORANDUM

This case involves broad-ranging allegations of employment discrimination and the violation of related Federal statutes levied by a Federal employee against the U. S. Department of Commerce ("Department"). Specifically, Plaintiff Azizollah Abrishamian's ("Abrishamian") Second Amended Complaint alleges (i) that the Department violated Title VII by discriminating against Abrishamian on the basis of race, national origin, religion, and by retaliating against him, (ii) that the Department violated the Age Discrimination in Employment Act ("ADEA"), (iii) that the Department violated the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 4302(b)(1) et seq., (iv) that the Department violated the Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. 552a, and (v) that the Department violated the Family Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601.

Now pending is the Department's Motion for Summary Judgment. As the Motion has been fully briefed, the Court will dispense with a hearing. See Local Rule 105.6. (D. Md. 2001). For the reasons stated below, the Court will, by separate Order, DENY the Department's motion to dismiss as to Abrishamian's most recent failure-to-promote claim, and GRANT the Department's motion as to all

remaining counts.

I. BACKGROUND

From 1983 until July 2, 1999, Abrishamian worked as an engineer for the National Institute of Standards and Technology ("NIST"), a unit of the Department of Commerce. On September 13, 2000, Abrishamian filed his initial Complaint in this lawsuit, which encompassed 192 pages and 961 numbered paragraphs, and claimed employment discrimination, retaliation, and unlawful termination under Title VII, and violations of the Privacy Act. On August 28, 2001, this Court granted the Department's Motion to Dismiss for failure to comply with Federal Rule of Civil Procedure 8. The Court allowed Abrishamian to re-file, but imposed a 25-page limit on any further memoranda filed by Abrishamian's Counsel. Abrishamian filed an Amended Complaint, and on September 24, 2001, he filed the operative Second Amended Complaint.

After the close of discovery, the Department filed the pending Motion for Summary Judgment. Although Abrishamian's Motion in Opposition meets the page limit imposed by this Court, it attaches several hundreds of pages of exhibits, including a 32-page affidavit sworn by Abrishamian himself. Abrishamian relies almost exclusively upon his own affidavit in opposing the Department's Motion.

Abrishamian's prolix complaints are difficult to analyze. Nevertheless, they may be summarized as follows. Abrishamian's grievances center upon the actions oftwo of his supervisors, James Albus ("Albus") and John Evans ("Evans"). Abrishamian alleges that both of his supervisors discriminated against him over a fifteen-year period through their offensive comments, rudeness, by giving him demeaning tasks, and continually denying him training and promotional opportunities. He alleges that these supervisors wrongfully evaluated his performance, refused to give him sufficient guidance, and

sought sensitive medical information from him, in part because of his race, religion, and national origin, and in part to retaliate against him for complaining to the Equal Employment Opportunity Commission ("EEOC"). He also alleges that a number of his peers made fun of his accent, national origin Iranian), and religion (Jewish), and generally treated him rudely. The Department denies all of these factual allegations.

II. STANDARD OF REVIEW

The Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); see also Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (recognizing that trial judges have "an affirmative obligation" to prevent factually unsupported claims and defenses from proceeding to trial). Nevertheless, in determining whether there is a genuine issue of material fact, the Court views the facts, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party. Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987).

III. ANALYSIS

A. Employment Discrimination under Title VII and the ADEA

To establish a violation of either Title VII or the ADEA, Abrishamian must show that he suffered some adverse employment action. Abrishamian attempts to satisfy this requirement through

three theories: failure to promote, constructive discharge, and hostile work environment. 1

1. Failure-To-Promote

Abrishamian alleges that the Department failed to promote him five times between 1988 and 1998. To maintain an action under Title VII, a Federal employee must contact an EEOC counselor "within 45 days after date of the matter alleged to be discriminatory." Pueschel v. Veneman, 185 F. Supp. 2d 566, 568 (D. Md. 2002) (quoting 29 C.F.R. § 1614.105(a)(1)). Similarly, under the ADEA, Abrishamian must file a notice of intent to sue with the EEOC within 180 days after the alleged unlawful practice: 29 U.S.C. § 633a(d). The first four opportunities arose in the early 1990's or earlier. Abrishamian did not contact the EEOC, however, until December 10, 1998. Thus, Abrishamian's first four failure-to-promote claims are untimely under both Title VII and the ADEA.

Abrishamian contends that none of his failure-to-promote allegations are time-barred because the Department's actions constituted a continuing violation. The Court disagrees. Discrete discriminatory acts such as the failure to promote an employee "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Thus, Abrishamian's continuing violation theory is unavailing. The Court will, therefore, DISMISS Abrishamian's first four failure-to-promote claims.

By contrast, the record does not make clear exactly when the final promotional opportunity arose. The Department contends broadly that all of Abrishamian's failure-to-promote claims are time

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1 Although Abrishamian complains of other actions, e. g., his office being moved to the basement or his coworker's rudeness, the overwhelming majority of these complaints do not constitute an adverse employment action, unless they rise to the level of constructive discharge or create a hostile work environment.

barred. It fails, however, to analyze this final opportunity, and does not point out the facts necessary to understand the nature of this promotion, the date on which Abrishamian was bypassed for this promotion, or the date on which he was required to contact the EEOC. Although Abrishamian suggests that this final opportunity arose in late 1997 or 1998, he is also vague concerning the facts supporting this claim. Accordingly, the Court will provide both sides with an opportunity to supplement the record and submit further briefs on this issue.

Abrishamian must also demonstrate that the Department chose not to promote him for this final opportunity because of his age, race, national origin, religion, or in retaliation for contacting the EEOC. Abrishamian puts forth direct evidence that Albus, his supervisor at the time of the final promotional opportunity, discriminated against him because of his age and/or national origin.2 Given this evidence, there is a genuine issue of material fact as to whether the Department failed to promote Abrishamian because of his age or national origin. Accordingly, this Court will DENY the Department's Motion for Summary Judgment without prejudice as to the final failure-to-promote claim. If the Department believes that this final failure to promote claim is untimely under either the ADEA or Title VII, it may renew its Motion.

2. **Constructive Discharge**

Abrishamian attempts to show an adverse employment claiming that the Department

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2 Abrishamian alleges that in late 1998, Albus told him that he was over 50 and did not have "zing." He also claims that Albus told him that he was not qualified for a leadership position because Iranians were not leaders but rather followers of Ayatollah. Given this direct evidence of discrimination, "the McDonnell Douglas test is inapplicable." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

constructively discharged him. To prove he was constructively discharged, Abrishamian must show:

> (1) [the Department's] actions of which [he] complains were deliberately done; and (2) [his] working conditions were intolerable. Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the plaintiff to quit. Whether a plaintiffs working conditions were intolerable is assessed by the objective standard of whether a reasonable person in the plaintiffs position would have felt compelled to resign.

Taylor v. Virginia Union Univ., 193 F.3d 219, 237 (4th Cir. 1999) (internal citations omitted).

Abrishamian's allegations do not create a jury issue on his constructive discharge claim. Many of the incidents Abrishamian points to happened so far in the past that no reasonable jury could find that they affected his work environment as of the time he resigned. For example, Abrishamian complains that several of his co-workers rhymed his first name "Azizollah" with "Ayatollah," an offensive reference to his Iranian roots. He also argues that some of his peers ridiculed him for observing kosher. These alleged incident occurred, however, sometime around 1991. Similarly, Abrishamian claims that he once worked in a subgroup at the NIST wholly comprised of naturalized citizens. He presses this as circumstantial evidence of Albus's bias. The group was formed sometime in 1988, and its members have long since moved on to other assignments. 3

To sustain a constructive discharge claim, the conditions of Abrisharnian's workplace, measured at the time he left in July of 1999, must have been intolerable. Accordingly, conduct that occurred in the early 1990's says little about his working environment in 1999. Similarly, Abrishamian's

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3 Abrishamian complains of several other incidents that happened long before he left NIST. For example, he complains that Albus "pocket-vetoed" his promotion from GS-13 to GS-14, that he was forced to move to a basement office, to share another office with his former secretary, and, as discussed above, that he was wrongfully passed over for several promotions. All of these alleged incidents occurred prior to the mid-1990's.

decision to continue working until 1999 means that he himself did not find his situation intolerable in earlier periods.

Moreover, Abrishamian's allegations that he was given low-level work, given unfair performance reviews, and was not given sufficient guidance do not rise to the level of constructive discharge. The record establishes that, in late 1998 or early 1999, Abrishamian was assigned six complex engineering tasks. While Abrishamian may argue that these projects were beneath his skill level, the record contradicts any claim that he was doing solely menial work. Furthermore, a court is in no position to judge the relative complexity of high-level engineering tasks.

Abrisharnian also contends that his work consisted of menial chores unsuitable for a professional engineer. The record does not support his contention. While Abrisharnian alleges that, from time to time, he was required to perform janitorial tasks, the record establishes that Abrishamian was merely required to keep his laboratory clean and occasionally to move large laboratory equipment. The record also establishes that these assignments were not unique to Abrishamian, but that the Department expected all engineers to keep their labs clean and well organized.

Abrishamian's claim that he was subject to unfair performance reviews is similarly unavailing. The receipt of negative performance evaluations cannot make a workplace intolerable. Moreover, Abrishamian's subjective view that his performance warranted a positive evaluation is entitled to no weight. See Hawkins v. PepsiCo. Inc., 203 F.3d 274, 280 (4th Cir. 2000) ("[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff.") (quoting DeJarnette v. Corning, Inc., 133 F.3d 293, 300 (4th Cir. 1998)).

Finally, the remainder of Abrishamian's complaints do not establish that he was constructively

discharged. Abrishamian alleges that in September of 1998, Albus told him that he lacked "zing" because he was over 50. He contends that around the time of the latest promotional opportunity, Albus told him that Iranians were not leaders but followers of the Ayatollahs. He also claims that Evans advised him to retire because he was too old; once on November 9, 1998, and once on January 5, 1999. Finally, in May of 1999, Evans requested that Abrishamian provide him with medical information so that Evans could approve Abrishamian's sick leave. According to Abrishamian, Evans stated that, as an Iranian and a Jew, Abrishamian knew how to cajole his doctor into giving Evans the medical information he sought. 4

Even if these allegations are true, they fail to establish that a reasonable worker would feel compelled to leave. First, the alleged statements were spread out over the course of eight months. Second, Abrishamian admits that there were several amicable intervals in which he was not subjected to offensive remarks. Third, there is no evidence that Abrishamian's supervisors encouraged his coworkers to isolate him. To the contrary, the record reveals several pleasant and supportive interactions between Abrishamian and his peers, including a "get well soon" card signed by many of Abrishamian's co-workers. Finally, Abrishamian points to only five offensive comments in the year before he left NIST. Viewing these allegations as a whole, no reasonable jury could find that these conditions were so intolerable that an average person would feel compelled to quit. The fact that a worker may feel stymied in his professional advancement does not give him license to depart claiming constructive discharge.

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4 Albus and Evans deny making these remarks.

3. **Hostile Work Environment**

Abrishamian argues that the conditions in his office constituted a hostile work environment. The standard for establishing a hostile work environment claim is less demanding than a constructive discharge claim. Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992). Thus, this Abrishamian's failure to establish a constructive discharge is not dispositive of his hostile work environment claim. To state a hostile work environment claim, Abrishamian must show (i) that he experienced unwelcome harassment, (ii) that the harassment was based on his race, religion, national origin, or age, (iii) that the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive environment, and (iv) that there is some basis for imputing liability to the Department. Bass v. E. I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003). This only occurs "[w]hen the workplace is permeated with discriminatory . . . intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 331 (4th Cir. 2003) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). Moreover, "the sporadic use of abusive language" is not sufficient to create a hostile work environment. Faragher v. City of Boca Rator~ 524 U.S. 775, 788 (1998).

Judged by these standards, Abrishamian's allegations of offensive conduct do not establish a hostile work environment. Abrishamian admits that there were long periods when he was not subject to offensive remarks. Abrishamian argues, nevertheless, that co-workers "continuously" made fun of his name, nationality, accent, and observance of kosher. When questioned on deposition, however, the only offensive comments he could point to during the last two years of his tenure were the five remarks

allegedly made by Albus and Evans, as outlined in Section III.A.2, supra. Even if these five remarks were made, they clearly would not have rendered his work environment hostile. Accordingly, this Court rejects Abrishamian's hostile work environment claim.

B. CSRA Claim

Abrishamian argues that the Department violated his rights under the CSRA because (i) his reviewing official did not approve the changes to his fiscal year 1998 ("FY-98") performance review, (ii) his reviewing official did not sign his FY-98 performance review on time, (iii) his supervisor did not give him his FY-99 performance plan on time, (iv) that the wrong person signed his FY-99 performance plan, and (v) that the FY-99 performance plan he finally received did not give him sufficient guidance. The relevant statutory text provides:

> Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for-
>
> (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system.

5 U.S.C. § 4302(b)(1).

Abrishamian's CSRA claims fail as a matter of law. Initially, Abrishamian's first and second grievances contradict each other. Abrishamian admits that Richard Jackson, his reviewing official, eventually signed--and therefore approved--his FY-98 performance review. Second, Abrishamian's complaints about the timeliness of his FY-98 performance review and FY-99 performance plan fail to state a cause of action under the CSRA. Assuming that agencies require performance reviews and plans to be delivered by October 30, 1998, Abrishamian has not established a violation of the CSRA.

While the complete failure to give an employee any performance review or plan may constitute a violation of the CSRA, mere delay does not. See Weirauch v. Dep't of Army, 782 F.2d 1560, 1563 (Fed. Cir. 1986).

Finally, even if Abrisharnian's FY-99 performance plan was vague, he has failed to establish a violation of the CSRA as a matter of law. The Department need not give Abrishamian guidance solely through a formal performance plan. To the contrary, the Department may communicate its expectations "in any manner calculated to apprise [Abrishamian] of the requirements against which [he] is to be measured." Melnick v. Dep't of Hous. & Urban Dev., 42 M.S.P.R. 93, 99 (1989). Even if Abrishamian's FY-99 performance plan was somewhat vague, he received additional guidance in a March 10, 1999 memorandum from Evans, his supervisor. 5 This memorandum describes, over the course of eight single-spaced pages and in exhaustive detail, Evans's evaluation of five recent tasks completed by Abrishamian, a numerical assessment of Abrishamian's work as a whole, Evans's expectations of engineers at Abrishamian's level, the principal objectives and knowledge base required for Abrishamian's position, and Evans's expectations of Abrishamian over the next 60 days. No reasonable jury could find that Abrishamian lacked guidance. Accordingly, this Court will GRANT the Department's motion for summary judgment as to Abrishamian's CSRA claim.

C. Privacy Act Claim

Abrishamian further argues that the Department violated his rights under the Privacy Act when it requested medical information from him. In general, the Privacy Act prohibits Federal agencies from

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5 Abrishamian admits receiving this memorandum.

disclosing information such as medical history that it collects from individuals. See 5 U.S.C. §§ 552a(a), (b). In late April and early May of 1999, Abrishamian had been absent from work on sick leave for nearly five weeks. Abrishamian failed to notify his supervisors directly as to why he had been absent. Instead, Abrishamian faxed a cursory note from his doctor to a secretary in the NIST, stating baldly that "[t]his leave is medically necessary, because of a severe medical disorder." On May 20, 1999, Evans sent Abrishamian a letter requesting more information about his medical problems. Abrishamian eventually sent his reply directly to a doctor within NIST, and Evans never saw any sensitive medical information regarding Abrishamian.6 Evans's request for information forms the basis for Abrishamian's Privacy Act claim.

Unlike a typical Privacy Act claim, Abrishamian does not allege that the Department wrongfully disclosed his information to a third party.7 Rather, Abrishamian argues that the Department violated his rights under the Privacy Act by failing to properly inform him of (i) the Department's authority for collecting the information, (ii) the principal purpose for which the information was sought, (iii) the routine uses made of the information, and (iv) the effects on him of not providing the information.

In addition to proscribing the wrongful disclosure of information, the Privacy Act requires that agencies seeking information covered by the Act make a series of disclosures explaining the authority for collecting, principal purpose, routine uses, and effects of not providing the requested information. 5

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6 Evans subsequently approved additional leave.

7 Abrishamian admitted in his deposition that he had no information that would lead him to believe that the Department disclosed his information to anyone.

[5]U.S.C. § 552a(e).8 The Privacy Act also creates a private cause of action whenever an agency fails to make the required disclosures "in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D).

Abrishamian's claims under the Privacy Act fail as a matter of law. First, Abrishamian does not present any evidence suggesting that the Department's failure to explain its authority or purpose for requesting the required information adversely affected him.9 Second, putting aside whether Abrishamian can show that he was adversely affected, he cites no authority for the proposition that the Privacy Act meant to constrain employers from requesting that their employees to explain a protracted absence. Accordingly, this Court will GRANT the Department's motion for summary judgment as to Abrishamian's CSRA claim.

D. FMLA claim

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8 Title 5 U.S.C. § 552a(e) provides:

Each agency that maintains a system of records shall . . .

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual-

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;
(B) the principal purpose or purposes for which the information is intended to be used;
(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and
(D) the effects on him, if any, of not providing all or any part of the requested information.

9 The only evidence Abrishamian presents on this point is his own circular statement that he was harmed by the Department's failure to properly inform him.

Finally, Abrishamian claims that the Department violated his rights under the FMLA by invoking his FMLA entitlements without his knowledge or permission. 10 The Department argues that Abrishamian's FMLA claim is barred by sovereign immunity. This Court Agrees.

Title II of the FMLA covers federal employees. Unlike Title I, which covers private employees, Title II does not contain an unequivocal waiver of sovereign immunity. Mann v. D. N. Haigh, 120 F.3d 34, 37 (4th Cir. 1997). Thus, Federal employees may not sue the government for violations of the FMLA. Id. Abrishamian does not dispute that he is an "employee" as defined in Title II. See 5 U.S.C. §§ 6381(1), 6301(2), 2105(a). Accordingly, this Court holds that Abrishamian's FMLA claim is barred by sovereign immunity, and will GRANT the Department's motion for summary judgment as to this claim.

IV. CONCLUSION

For the reasons stated herein, this Court will, by separate Order, DENY the Department's Motion for Summary Judgment as to Abrishamian's final failure-to-promote claim without prejudice, and will GRANT the Department's Motion as to all remaining claims. The Department may re-file its Motion for Summary Judgment on the issue of whether Abrishamian's final failure-to-promote claim is timely.

Dated this 30th day of September, 2003.

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10 Abrishamian argues that Evans did this when, in response to Abrishamian's request for sick leave, Evans stated, "I approve your leave under FMLA."

/s/

Benson Everett Legg
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AZIZOLLAH ABRISHAMIAN,	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL NO.**
	:	
DONALD L. EVANS, SECRETARY,	:	**L-00-2746**
U.S. DEPARTMENT OF COMMERCE,	:	
Defendant.	:	

ORDER

Currently pending is the U.S. Department of Commerce's ("Department") Motion for Summary Judgment. For the reasons stated in the Memorandum filed this date, the Court hereby:

(i) DENIES without prejudice to re-filing the Department's Motion for Summary Judgment (Docket No. 47) as to Azizollah Abrishamian's ("Abrishamian") final failure to-promote claim;

(ii) GRANTS the Department's Motion for Summary Judgment (Docket No. 47) as to all remaining claims.

The Court will allow the Department to re-file its Motion for Summary Judgment as to whether Abrishamian's final failure-to-promote claim is timely. Accordingly, on or before October 14, 2003, the parties shall submit a joint status report addressing the following:

(i) Whether the Department intends to re-file its motion;
(ii) If so, whether additional discovery is necessary,
(iii) A proposed discovery and briefing schedule.

It is so ORDERED this 30th day of September, 2003.

/s/
Benson Everett Legg
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AZIZOLLAH ABRISHAMIAN	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL NO. L-00-2746**
	:	
WILLIAM M. DALEY, et al.,	:	
Defendants.	:	

MEMORANDUM

This case centers upon allegations of employment discrimination. Now pending before the Court are (i) Plaintiff Azizollah Abrishamian's motion to vacate the judgment [Docket No. 71], (ii) the Defendant U.S. Department of Commerce's renewed motion for summary judgment [Docket No. 73], and (iii) Abrishamian's motion for leave to file a sur-reply [Docket No. 81]. In light of the parties' most recent briefs, the Court finds that Abrishamian failed to exhaust his administrative remedies as a matter of law. Accordingly, the Court will, by separate Order filed this date, DENY Abrishamian's motion to vacate, DENY Abrishamian's motion for leave to file a sur-reply, and GRANT the Department's renewed motion for summary judgment.

1. BACKGROUND

From 1983 until July 2, 1999, Abrishamian worked as an engineer for the National Institute of Standards and Technology ("NIST"), a unit of the Department of Commerce. On September 13, 2000, Abrishamian filed his initial Complaint in this lawsuit, which encompassed 192 pages and 961 numbered paragraphs, and claimed employment discrimination, retaliation, and unlawful termination

under Title VII, and violations of the Privacy Act. On August 28, 2001, this Court dismissed the Complaint for failure to comply with Federal Rule of Civil Procedure 8. The Court allowed Abrishamian to re-file, but imposed a 25-page limit on any further memoranda filed by his Counsel. Abrishamian filed an Amended Complaint, and on September 24, 2001, he filed the operative Second Amended Complaint.

After the close of discovery, the Department moved for summary judgment. Abrishamian's motion in opposition attached several hundreds of pages of exhibits, including a thirty-two page affidavit sworn by Abrishamian himself. Abrishamian relied almost exclusively upon that affidavit in opposing the Department's first motion for summary judgment.

In summary, Abrishamian alleged that two of his supervisors (James Albus and John Evans) discriminated against him over a fifteen-year period through their offensive comments, rudeness, by giving him demeaning tasks, and continually denying him training and promotional opportunities in violation of Title VII and the Age Discrimination in Employment Act ("ADEA").[1] The Court granted summary judgment in favor of the Department on Abrishamian's constructive discharge and hostile work environment theories.

Abrishamian also alleged that the Department failed to promote him five times between 1988 and 1998. Four of these promotional opportunities arose prior to the mid- 1990's. Abrishamian first contacted the EEOC, however, on December 10, 1998. The Court granted summary judgment on

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1 Abrishamian also alleged violations of the Civil Service Reform Act, Privacy Act of 1974, and the Family Medical Leave Act of 1993. The Court granted summary judgment in favor of the Department on all of these claims.

these claims, finding them time-barred.

The record was unclear as to the timing of the final promotional opportunity, however. The Court, therefore, denied summary judgment, and allowed the parties to re-brief the timeliness of this last claim.

On October 15, 2003, Abrishamian moved under Rule 59(e) to vacate this Court's partial grant of summary judgment. On October 30, 2003, the Department renewed its motion for summary judgment as to the final failure to promote. Abrishamian seeks to file a sur-reply to the Department's reply in support of its renewed motion for summary judgment.

II. ANALYSIS

A. Abrishamian's Motion to Vacate

Abrisharnian challenges this Court's partial grant of summary judgment in favor of the Department. The motion to vacate totals ten pages, and attached a thirty-four page affidavit signed by Abrishamian. After the Department opposed the motion, Abrishamian's Counsel filed a forty-four page reply brief, accompanied by yet another affidavit from the Plaintiff spanning twelve pages. Both affidavits were filed months after the close of discovery.

The sum total of these briefs and affidavits merely seek to re-argue questions decided by this Court in its September 30, 2003 Memorandum. It is well settled that a Rule 59(e) motion "may not be used to relitigate old matters." Pacific Ins. Co. v. American Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) (quoting Wright et al., Federal Practice and Procedure Civil 2d. § 2810.1). Because Abrishamian presents no compelling reason to revisit these issues, the Court will DENY his motion to vacate.

B. Abrishamian's Motion for Leave to File Sur-Reply

Abrishamian seeks to file a sur-reply to the Department's reply brief in support of its renewed motion for summary judgment. Sur-replies are allowed only with leave of Court, Local Rule 105.2.a (D. Md. 2001), and "may be permitted when the moving party would be unable to contest matters presented to the court for the first time in the opposing party's reply." Khoury v. Meserve, 268 F. Supp. 2d 600, 605 (D. Md. 2003).

Abrishamian contends that the Department's reply brief raises two new issues: (i) the timing of the final failure to promote, and (ii) whether Abrishamian exhausted his administrative remedies. Neither issue is new. After hundreds of pages of briefs and exhibits, the Court need not consider further filings, and will DENY Abrishamian's motion for leave to file a sur-reply.

C. The Department's Renewed Motion for Summary Judgment

The Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In determining whether there is a genuine issue of material fact, the Court views the facts, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party. Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987).

Abrishamian's final failure to promote claim challenges the Department's refusal to promote him to leader of the Perception Systems Group. On November 23, 1997, the previous group leader, Martin Herman, left this post for a new position within the NIST. (Def.'s Mem. in Supp. of Renewed

Mot. Summ. J. Ex. 1.) Abrishamian alleges that, sometime thereafter, he applied for the group leader position but was angrily rebuffed by Albus. 2 (Abrishamian Dep. 75.) The Department contends that the undisputed material facts show that Abrishamian failed to exhaust his administrative remedies regarding this claim.

A federal employee seeking relief under the ADEA must either (i) "bring a claim directly to federal court so long as, within 180 days of the allegedly discriminatory act, he provides the EEOC with notice of his intent to sue at least 30 days before commencing suit," or (ii) "invoke the EEOC's administrative process, and then sue if dissatisfied with the results." Rann v. Chao, 346 F.3d 192, 195 (D.C. Cir. 2003); 29 U.S.C. 633a(d).

Abrishamian does not allege that he notified the EEOC thirty days before commencing suit. Accordingly, he must show that he properly invoked the EEOC's administrative process, including the requirement that he contacted an EEOC counselor "within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1).

Federal employees suing under Title VII have no option to bring a claim directly to federal court, and therefore must contact an EEOC counselor within the same 45 day window. See Pueschel v. Veneman, 185 F. Supp. 2d 566, 568 (D. Md. 2002) (citing 29 C.F.R. § 1614.105(a)(1)).

Abrishamian fails as a matter of law to show that he properly invoked the EEOC's

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2 Abrishamian's failure to promote cause of action accrued as of the date of this alleged discussion. See Martin v. Southwestern Va. Gas Co., 135 F.3d 307, 310 (4th Cir. 1998) (holding that an unlawful employment practice occurs on the date that the employee is given definitive notice of the employment decision). Despite additional briefing, the exact timing of this alleged exchange remains unclear. Because the Court finds that Abrishamian never exhausted his administrative remedies, the date of this conversation is irrelevant.

administrative process. The only evidence that Abrishamian exhausted his administrative remedies is his own affidavit, filed months after the close of discovery, alleging that he discussed the Perception Systems Group position with EEOC Counselor George Klouda during their interviews in December of 1998. The record conclusively refutes this allegation.

First, Abrishamian admitted at deposition that he did not file an EEO complaint regarding the Department's failure to promote him to leader of the Perception Systems Group. (Abrishamian Dep. 78.)

Second, Abrishamian's administrative complaint arising out of the December 1998 meetings with Klouda does not allege that he was wrongfully denied this position. Although the administrative complaint (spanning fourteen single-spaced pages) charges that Abrishamian was wrongfully denied three group leader positions in early 1995, the Perception Systems Group is mentioned only in an unrelated context. (Def.'s Mot. for Summ. J. Ex. 2.)

Third, the Department's Office of Civil Rights wrote a confirmatory letter to Abrishamian identifying the issues raised by the administrative complaint. (Id. Ex. 3.) The letter does not mention the Perception Systems Group. Moreover, the letter requests that Abrishamian notify the Department if it did not correctly identify the issues raised by the administrative complaint. (Id.) Abrishamian did not respond.

Finally, an exhaustive, eleven page, single-spaced memorandum from Mr. Klouda documenting his meetings with Abrishamian makes no mention of the Perception System Group. (Pl.'s Mem. in Opp. to Summ. J. Ex. 7a.) The Court finds, therefore, that Abrishamian failed to exhaust his administrative remedies as a matter of law and will GRANT the Department's renewed motion for

summary judgment.

III. CONCLUSION

For the reasons stated herein, the Court will, by separate Order filed this date, DENY Abrishamian's motion to vacate the judgment [Docket No. 71], GRANT the Department's renewed motion for summary judgment [Docket No. 73], DENY Abrishamian's motion for leave to file a sur-reply [Docket No. 81], and DIRECT the Clerk of the Court to CLOSE this case.

Dated this 26th day of March, 2004.

/s/
Benson Everett Legg
Chief Judge

APPENDIX C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1683

AZIZOLLAH ABRISHAMIAN,

Plaintiff - Appellant,

versus

WILLIAM M. DALEY, Secretary, U.S. Department of Commerce;
UNITED STATES DEPARTMENT OF COMMERCE,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson Everett Legg, Chief District Judge. (CA-00-2746-L)

Submitted: November 4, 2004 Decided: November 15, 2004

Before WILKINSON, MOTZ, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Azizollah Abrishamian, Appellant Pro Se. Larry David Adams, Assistant United States Attorney, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Azizollah Abrishamian appeals from the district court's final order dismissing his civil action alleging employment discrimination. The order also denied Abrishamian's motion to reconsider an earlier order denying all but one of his claims.

We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Abrishamian v. Daley, No. CA-00-2746-L (D. Md. Mar. 26, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX D

[FILE COPY]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 14, 2005

No. 04-1683
CA-00-2746-L

AZIZOLLAH ABRISHAMIAN
Plaintiff - Appellant

v.

WILLIAM M. DALEY, Secretary, U.S. Department of Commerce;
UNITED STATES DEPARTMENT OF COMMERCE
Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Motz, and Judge Duncan.

For the Court,
/s/ Patricia S. Connor

CLERK

NOTICE OF ISSUANCE OF MANDATE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
April 22, 2005

MANDATE

TO: Clerk, District Court
FROM: Lisa D. Nesbitt
Deputy Clerk
RE: 04-1683 Abrishamian v. Daley
CA-00-2746-L

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 11/15/04.

[ ] Order and Certified Copy of Judgment
[x] Opinion and Cer-tified Copy of Judgment
[ ] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule 45
[ ] Other: _____
[ ] The record has been retained for use in case number ____

cc: Azizollah Abrishamian
Larry David Adams

APPENDIX E

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FINAL DECISION

BY THE

U.S. DEPARTMENT OF COMMERCE

IN THE DISCRIMINATION COMPLAINT OF

Azizollah Abrishamian

COMPLAINT NUMBERS

99-57-00247 & 99-57-00626

REMARK:

Page 12 of the Final Decision by the U.S. Department of Commerce has the above page and complaint numbers and in part documents the following:

Retaliation

In order to establish a *prima facie* case of retaliation, Complainant must prove three elements:

1. protected participation or opposition under federal civil rights laws;
2. an employment action or actions disadvantaging him; and
3. the disadvantaging action followed the protected activity within such a period of time that a retaliatory motivation may be inferred.

Hochstadt, supra

Complainant filed his first EEO complaint on February 24, 1999. On March 10, 1999, Evans, who was interviewed by the EEO Counselor for the first complaint, issued a memorandum critical of Complainant's performance. On May 20, 1999, he issued a letter concerning Complainant's continued use of leave. These actions followed Complainant's first complaint within such a short time that we find a *prima facie* case of reprisal.

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No. 05-447

FILED
DEC - 9 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AZIZOLLAH ABRISHAMIAN
Petitioner

v.

CARLOS M. GUTIERREZ,
SECRETARY OF COMMERCE, ET AL.
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Azizollah Abrishamian
9328 Edgewood court
Gaithersburg, MD 20877
(301) 977-2460

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II. The Court should consider and grant this Petition for Rehearing because of the Court's

recent grant for certiorari to review the 9th Circuit "retaliation" decision in Ceballos v. Garcetti (9th Cir 03/22/2004) – this grant by the Court constitutes an "intervening circumstance[] of ... substantial effect," in that a charge of "retaliation" presents the critical importance and expectation that it must be addressed rather than ignored by the Judge showing his (her) partiality as to the matters within his (her) jurisdiction. ----------7

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, I respectfully petition the Court for rehearing of its denial of my Petition for writ of Certiorari issued on November 14, 2005.

REASOND FOR GRANTING THE PETITION FOR REHEARING

I. The Court should consider and grant this Petition for Rehearing because this petition puts forth a "substantial ground not previously presented" in the Petition for Certiorari – the record discloses that the conduct of the District Court Judge was consciously egregious and that this fact should be properly considered in this Court's determination of whether the Judge's conduct was "conscience shocking" in the constitutional sense and therefore a violation of substantive due process.

The degree of fault that supports a finding that Government conduct is "conscience-shocking in the constitutional sense," giving rise to a violation of substantive due process is explained by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 845-850 (1998) (footnotes omitted).

> It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common law fault, but rather points clearly away from liability, or clearly towards it, ...; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. See ... 106 S. Ct., at 663; see also *Davidson v. Cannon*, 474 U.S., at 348, 106 S. Ct., at 670-671 (clarifying that *Daniels* applies to substantive, as well as procedural, due process). It is,

> on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. See *Daniels v. Williams*, 474 U.S., at 331, 106 S. Ct., at 665 ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original)).
> Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct, such as reckless or 'gross negligence,'" *id.*, at 334, n.3, 106 S. Ct., at 666, n.3, is a matter for closer calls. To be sure, we have expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment, *ibid*, and our cases have compelled recognition that such conduct is egregious enough to state a substantive due process claim in at least one instance.

Therefore, the Court in Lewis established that:

1. "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 849,
2. But, "conduct on the other end of the culpability spectrum … would most probably support a substantive due process claim." *Id.*,
3. "[W]hether the point of conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but less than intentional conduct, such as

recklessness or 'gross negligence,' is a matter for closer calls." *Id.*

In my case, a cursory review of the record discloses that, in extinguishing my claim, not only was the act of the District Court Judge (Henceforth the Judge) intentional but that it was also egregious enough to support the conclusion that my case implicates the required high level of culpability that this Court demands as a condition to a finding that the Judge's conduct is "conscience-shocking in the constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

Records in my case reveal that my Federal Complaint encompassed three major areas: 1) Hostile work environment; 2) Retaliation; and 3) Constructive discharge.

To determine whether a work environment is "hostile," in *Harris v. Forklift Systems, Inc.*, 126 LED 2nd, 295, 510 U.S. 17 (1993) this Court has set the following litmus-test:

> "But we can say that whether an environment is "hostile" or "abusive" can be determined **only by looking at all circumstances**. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (*Id.* at 302; bolding added).

In *Faragher v. Boca Raton*, 524 U.S. 775 (1998) this Court went on to admonish lower courts for failure to heed this Court's already established standard for determination of hostile work environment expressed in *Harris*:

> "**We directed** courts to determine whether an environment is sufficiently hostile or abusive by '**looking at all circumstances**,' including the

> 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 787 (bolding added); See also *Onacle v. Sundowner Offshore Services, Inc.* 118 S. Ct. 998 (1998); *National Passenger Corp. v. Morgan*, 536 U.S. 101 (2001).

Yet when it came to determining my claim of "hostile and abusive" work environment, in the guise of analyzing my constructive discharge claim, the Judge flushed away most if not all of the components of my hostile environment claim and extinguished it by his arbitrary and capricious application of a test only applicable to the determination of constructive discharge claims and not for that of hostile work environment claims (see how the Judge destroyed all but a few of the elements of my hostile claim on pages 5-10 of Pet. App. A) and in doing so he transgressed by violating the long-standing litmus-test for hostile environment set by this Court in *Harris* and directed in *Onacle*, the test which have been uniformly adhered to by other Courts including his own District and Circuit Courts.

This Judge's act to destroy the components of my hostile claim was not accidental and did not occur out of negligence. Rather, because the Judge was already fully cognizant of the *Harris*' edict and precept (see Pet. App A, at 9) his action was intentional and egregious and he did it to purposely inflict injury upon me. Furthermore, this intentional destructive act by the Judge is an act of spoliation of my hostile work environment evidence which, according to 18 U.S.C. Section 2071, may be criminal when performed by a federal employee such as the Judge. This conduct by the Judge alone should support the conclusion that the Judge's conduct was "conscience-shocking in the constitutional sense."

Furthermore, in his two memorandums (see Pet. App. A, at 2 and App. B at 1-2) the Judge repeatedly complained that my September 13, 2000 Complaint in this lawsuit encompassed 192 pages and 961 numbered paragraphs; as a result he granted the Defendant's Motion to Dismiss on August 28, 2001. Moreover, that despite this infraction, he encouraged me to re-file provided my Counsel followed certain page limitation restriction. The Judge did not impose any other page limitations including for any sworn affidavit(s) prepared by me. This resulted in his satisfactory acceptance of my September 24, 2001 Second Amended Complaint which became operative. This seemingly fair action by the Judge was persuasive. It led me into believing that the Judge was going to be impartial and unbiased and that he would follow the rule of the law in his dealing with my case. Therefore, I diligently pursued my case and invested substantial time and capital to properly prepare it. This included the taking of some 14 depositions and a multitude of affidavits during the discovery. However, when it came to considering the facts, the Judge again first complained – this time not because my Counsel had violated any page limitation the Judge had previously imposed but rather because attached to my Motion in Opposition attached were "several hundreds of pages of exhibits" and "a 32-page sworn affidavit by" myself (see Pet. App. A, at 2) and then he egregiously acted and destroyed my case as explained above. This combination of facts regarding the action of the Judge is nothing short of Judicial "bate and switch." By his initial persuasion the Judge had induced and "bated" me into believing that he was going to fairly and constructively deal with my case by following the rule of law if only my Counsel would follow the Judge's imposed page restriction, which my counsel did. The Judge "switched" to, however, intentionally and egregiously destroying my case as explained above. This combination of conduct by the Judge is nothing short of "conscience shocking." Any person,

however ignorant of the law, by just committing a "bate and switch" tactic would pay dearly in terms of legal actions – both criminal and civil. How should the conduct of the Judge who is fully cognizant of the law but intentionally engages in far more severe conduct – purposeful and egregious destruction explained above combined with judicial "bate and switch" characterized? Anything short of "conscience-shocking?"

The Judge's conduct was not justifiable by any government interest. Rather, it was harmful because it was intended to injure contrary to any government interest. In the words of Justice Sandra Day O'Connor:

> The very first canon of the Code of Conduct for federal judges admonishes judges to 'uphold the integrity and independence of the judiciary.' As the Code of Conduct explains, '[a]n independent and honorable judiciary is indispensable to justice in our society.' In addition to placing tangible restrictions on judge's conduct, such as prohibiting judges from deciding a case in which he or she has a personal interest, the Code of Conduct recognizes the importance of perceptions of the judiciary. A perception of corruption, bias, or other unethical traits can be almost as harmful to society's confidence in its legal system and its respect for the rule of law as the reality of those traits. Judges must not only avoid impropriety, but also the appearance of impropriety, if public confidence in the judiciary is to be maintained. Thus, the Code of Conduct for federal judges provides that judges should refrain from conduct that would create a perception that the judge's ability to carry out his or her judicial responsibilities with integrity, impartiality, and competence is imparted. By insisting that judges establish, maintain and enforce the highest standards

of conduct, judicial codes of ethics are designed to ensure impartiality and that every case receives a fair hearing. (See Remarks by Sandra Day O'cconor before the Arab Judicial Forum, Manama, Bahrain, September 15, 2003).

When viewed in this light, the issue presented here provides this Court an important opportunity to make clear that the Judge violated my substantive right to due process by his "conscience-shocking" conduct. As was noted in my Petition for Certiorari, the substantive due process question presented here is framed by the particularly egregious set of undisputed facts posed by this record. The Judge's conduct described above should not go unrecognized by this Court, even if the courts below overlooked the constitutional significance of these undisputed facts. The Judge's conduct presents a sufficient ground for this Court to grant writ of Certiorari in my case.

II. The Court should consider and grant this Petition for Rehearing because of the Court's recent grant for certiorari to review the 9th Circuit "retaliation" decision in *Ceballos v. Garcetti* (9th Cir 03/22/2004) – this grant by the Court constitutes an "intervening circumstance[] of ... substantial effect," in that a charge of "retaliation" presents the critical importance and expectation that it must be addressed rather than ignored by the Judge showing his (her) partiality as to the matters within his (her) jurisdiction.

Another ground for a petition for rehearing is an "intervening circumstance[] of substantial effect. In *Garcetti v. Ceballos*, Ceballos was an assistant district attorney who sued his employer and his supervisors claiming that they "retaliated" against him in violation of his 1st Amendment right. Ceballos wrote a memorandum to his supervisor in

which he claimed that a deputy sheriff had lied in an application for a search warrant. Ceballos claimed that he was demoted in retaliation for this. The trial court granted summary judgment for the defendants on the ground of qualified immunity. The 9th Circuit reversed. This Court granted certiorari to review the 9th Circuit decision. This Court's grant of certiorari constitutes an "intervening circumstance[] of substantial effect" in my case because not only the fair adjudication of "retaliation" claims can not be ignored but rather such adjudication is so important that it warrants this Court's grant of certiorari; otherwise, this Court would not have made such grant in Ceballos. In my case, although the Judge acknowledged my complaint for retaliation, he ignored it completely and discarded it without any further due (see Petition at 7-13). The Judge's actions present an actual and substantial threat to my constitutional rights because his actions unjustly cause my retaliation claim to remain as yet unresolved, the outcome of which I have strong vested interest. See *DeFunis v. Odegaard* (1974). The issue is not one that could be avoided as unnecessary to the resolution of my case. Moreover, the Court had to apply and did apply some sort of standard of review in reaching its decision to deny in my writ for certiorari. But the Court disclosed nothing about what that standard of review was. I respectfully submit that these reasons should be sufficient to warrant granting this petition for rehearing.

CONCLUSION

For all of the foregoing reasons, I respectfully request the Court to grant my petition for rehearing.

Respectfully submitted,

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